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No. 87-1797

Supreme Court, U.S.
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In The Supreme Court of the United States
October Term, 1987

RICHARD GERALD JORDAN
PETITIONER

VERSUS

STATE OF MISSISSIPPI
RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where petitioner's conviction for capital murder became final on both direct and collateral review in 1982 the principles of res judicata do apply and the court below properly so held, certiorari should be denied.

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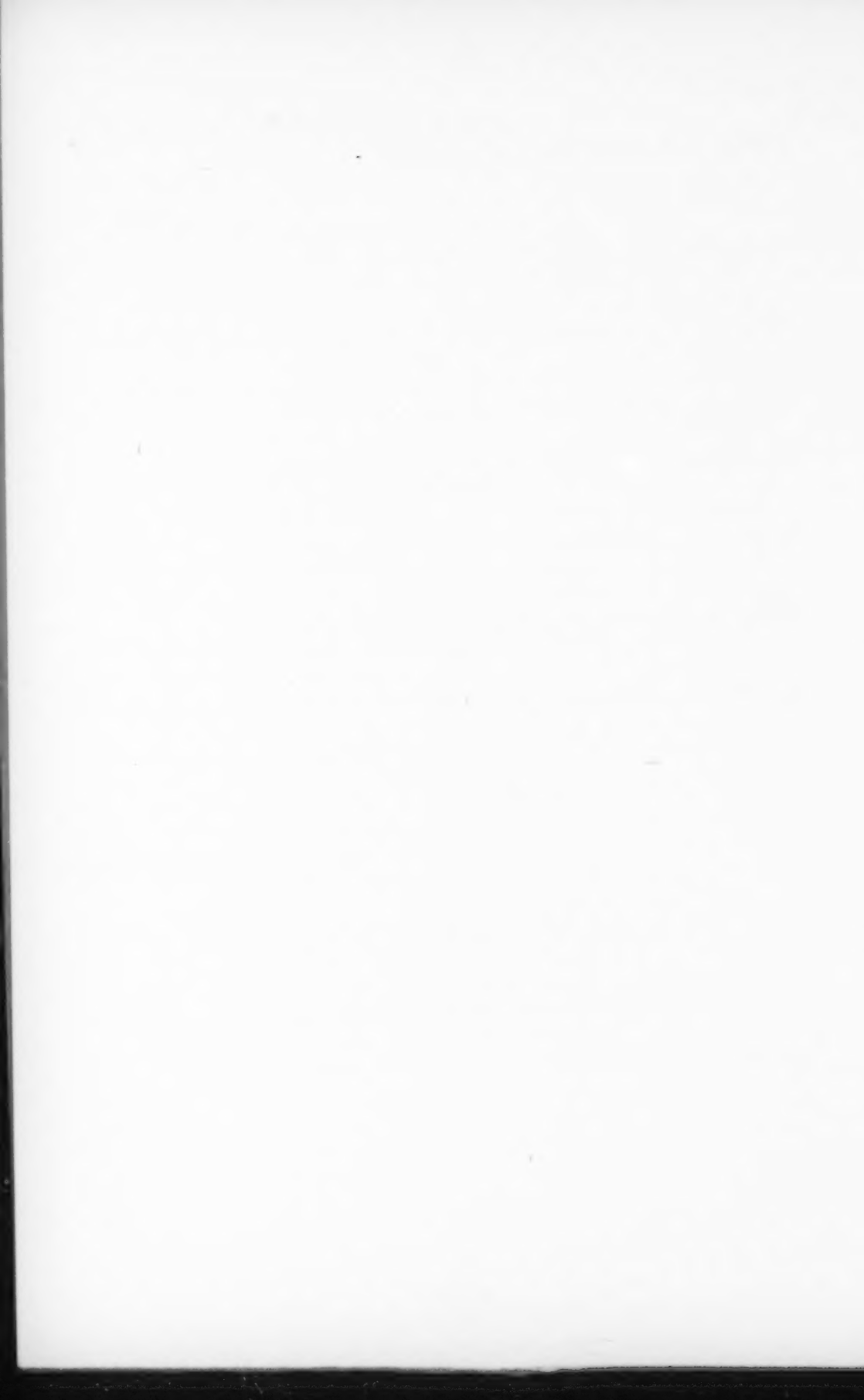
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NO. 87-1797

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi,
respectfully prays that the Petition for
Writ of Certiorari to the Supreme Court of
the State of Mississippi be denied in this
case.

OPINION BELOW

The opinion of the Supreme Court of the
State of Mississippi is reported as Jordan
v. State, 518 So.2d 1186 (Miss. 1987). A
copy of the opinion is before the Court in

petitioner's Appendix to Petition for Writ of Certiorari to the Supreme Court of Mississippi at 1a-8a.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S. § 1257(3). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VI and XIV. He also relies on Sections 99-39-21(3); 99-39-23(6); 99-39-27(9), Miss. Code Ann. (Supp. 1984).

STATEMENT OF THE CASE

The petitioner, Richard Gerald Jordan, was indicted on March 26, 1976, in the

Circuit Court of the First Judicial District of Harrison County, Mississippi for the January 13, 1976 kidnapping and murder of Edwina Marter. On motion for change of venue the matter was transferred to the Circuit Court of Jackson County, Mississippi where petitioner was tried and automatically sentenced to death. Within the time for the granting of a new trial the Mississippi Supreme Court decided Jackson v. State, 337 So.2d 1242 (Miss. 1976), holding that automatic imposition of the death penalty was improper. The trial court granted petitioner's motion for a new trial and Jordan was again put to trial under the guidelines imposed by the state court in Jackson, supra, concerning jury sentencing. Jordan was again convicted of capital murder and sentenced to death, this time by the jury in a bifurcated proceeding. The

Mississippi Supreme Court affirmed the conviction and sentence on direct appeal and rehearing was denied. Jordan v. State, 365 So.2d 1198 (Miss. 1979). Certiorari was denied by this Court in Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). Petitioner then petitioned the state supreme court for post-conviction relief. This petition for writ of error coram nobis was denied. In re Jordan, 390 So.2d 584 (Miss. 1980).

On January 3, 1980, prior to filing his petition for coram nobis relief, Jordan filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. These proceedings were stayed pending exhaustion of all claims in the state courts. On March 19, 1981 the Honorable William Harold Cox, United States District Judge, denied the

petition, and an appeal to the Court of Appeals for the Fifth Circuit ensued. On August 6, 1982, the Fifth Circuit affirmed in part and reversed in part the decision of the district court, vacating the sentence of death. Thereafter a petition for rehearing was denied. Jordan v. Watkins, 681 F.2d 1967, reh. den. sub. nom., Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982). Neither the state nor petitioner elected to file a petition for writ of certiorari with this Court.

A new sentencing hearing was held by the Circuit Court of Harrison County, Mississippi, First Judicial District and a death sentence returned in proper form by the jury on April 29, 1983. This marked the third time that Jordan had been sentenced to death. On automatic appeal to the Mississippi Supreme Court the sentence of

death was again affirmed on January 30, 1985. Rehearing was denied on March 13, 1985. Jordan v. State, 464 So.2d 475 (Miss. 1985).

Petitioner took a petition for certiorari to this Court raising three questions, none of them the present one. This Court granted certiorari on 1986, vacated the death sentence and remanded it for reconsideration light of Skipper v. South Carolina, 476 U.S. 1 (1986). Jordan v. Mississippi, 476 U.S. 1101 (1986).

On remand the court below ordered a new trial on the issue of sentence. While the remand matter this was pending, petitioner filed a second post conviction petition challenging his original conviction. This was disposed of along with the remand question in the opinion presently under

consideration. Jordan v. State, 518 So.2d 1186, 1189.

The facts reflected by the record show, that on or about January 10, 1976, in Baton Rouge, Louisiana, petitioner, traded a shotgun for a .38-calibre revolver. Then he traveled to Gulfport, Mississippi, and obtained lodging at the Twin Star Motel where he registered as "Jack Wilson." With kidnapping in his mind, and using the fictitious name of "Jack Wilson," Jordan called the Gulf National Bank and expressed a desire to speak to the commercial loan officer. He was referred to Mr. Marter, whose wife was soon to be Jordan's victim. Perusal of the telephone directory revealed to Jordan only one Gulfport listing of the name "Marter." Having obtained the Marter address from the directory, Jordan drove by the Marter residence where several cars were

parked, including a Mercedes and a sports car. After all but one of the cars was driven away, Jordan dialed the Marter residence telephone number and heard a female's voice answer. Then he decided to make his move.

Dressed in a sport coat, tie and knit pants, and carrying a manila folder, Jordan went to the Marter residence. He rang the door bell and was greeted by Mrs. Marter whom he told that his electrical company had received information of defective circuit breakers in the area which he was investigating. Mrs. Marter admitted him inside, whereupon he kidnapped Mrs. Marter at gunpoint and took her away, leaving her three-year-old son asleep in the house. At his command, she drove him out into the sparsely settled and wooded area of the DeSoto National Park. They traveled down a

logging road and stopped. Jordan ordered her out of the car, telling her that she would stay there with his partner until he obtained money from her husband after which he would release her. She became extremely fearful when she discovered there was no partner present. Petitioner forced Mrs Marter onto her knees and shot her in the back of the head.¹ He then went to a telephone and called Mr. Marter at the bank. Demanding \$25,000, Jordan stated: "We have your wife . . ." and gave Marter directions how to deliver the money on Highway 49 north of Gulfport. Marter quickly obtained the money, but his efforts to drop it failed because he could not find the coat (along side the highway) upon which

¹ Jordan, a self-described marksman, claims he shot Marter in the back of the head as she was running away from him.

he was supposed to drop the money. Being fearful of a trick on account of two vehicles following Marter, Jordan decided not to put the coat beside the highway.

Jordan took the .38-calibre revolver (the murder weapon) and threw it into the Big Biloxi River, from which it was later recovered after he revealed its location. Before Mr. Marter again attempted to deliver the money, as directed by a second telephone call from Jordan, the money was serialized and microfilmed by FBI officers investigating the matter. During this second telephone conversation between Jordan and Mr. Marter, Jordan assured Marter that his wife was all right, and demanded that Marter drop the money on Interstate Highway 10. Marter Proceeded as Jordan directed; this time he found the coat and dropped the

money on it. Two officers, Deputy Sheriff Larkin Smith and FBI Agent Shepherd, having been made aware of what was going on, were positioned near the scene of the drop and saw Jordan place a coat there. Soon they saw him pick up the money, after which they gave chase at high speed. During the chase, Jordan rammed his car into the vehicle of the officers, running them off the road. They shot at his receding car, but Jordan continued his flight although his car was rendered partially disabled in the ramming episode. Jordan later abandoned his vehicle at a shopping center, hid the money in some nearby woods, proceeded to another shopping center, and purchased a red jump-suit which he donned before he left the store. He got a taxi at the shopping center and told the driver to take him to the Twin Star Motel. Not knowing that Jordan was the man for whom

a man hunt search was under way, the taxi drive told Jordan that roadblocks were up and that the officers were looking for someone. En route to the motel, the taxi was stopped. Jordan was identified from a picture obtained by the FBI. The officer arrested Jordan and turned him over to the FBI. That afternoon, January 13, 1976, Mrs. Marter's body was found. On the next day a diver from the Gulfport Fire Department retrieved the murder weapon from the river.

REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of sufficient substance that would warrant the granting of this petition for writ of certiorari.

ARGUMENT

In order to completely understand the position of the state as to why this claim

petitioner continues to assert is barred by the doctrine of res judicata and law of the case and waiver we must look to the long procedural history of this case. Petitioner was indicted for capital murder on March 26, 1976, by the grand jury of the First Judicial District of the Circuit Court of Harrison County, Mississippi for the January 13, 1976 kidnapping and murder of Edwina Marter. On motion for change of venue the trial was transferred to the Circuit Court of Jackson, Mississippi where petitioner was tried and automatically sentenced to death. Within the time for the granting of a new trial, the Mississippi Supreme Court decided the case of Jackson v. State, 337 So.2d 1242 (Miss. 1976) in response to the rulings in Gregg v. Georgia, 428 U.S. 153 (1976), Profitt v. Florida, 428 U.S. 242 (1976), Jurek v. Texas, 428 U.S. 262 (1976). The

Mississippi Supreme held that automatic imposition of the death penalty was not permissible. The trial court granted petitioner's motion for a new trial and Jordan was again put to trial under the guidelines for a bifurcated trial set forth by the supreme court in Jackson. Jordan was again convicted of capital murder and sentenced to death, this time by the jury in a separate sentencing hearing. Jordan first raised the present issues concerning the confession he gave at trial and the trial court after an evidentiary hearing found the confession to be free and voluntary. The confession issue was next raised before the Mississippi Supreme Court on direct appeal. The court below addressed the issue and found no error in admitting the confession. Finding no other errors the conviction and sentence were affirmed and a petition for

rehearing was later denied. Jordan v. State, 365 So.2d 1198 (Miss. 1979). Petitioner next raised the question before this Court in his petition for certiorari taken from the affirmance on direct appeal. Certiorari was denied by this Court in Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). After denial of his petition for writ of certiorari Jordan then filed a state post-conviction petition in the form of an application for writ of error coram nobis with the court below. He did not raise the confession issue in this post-conviction action. His petition for writ of error coram nobis was denied in a written opinion. In re Jordan, 390 So.2d 584 (Miss. 1980).

Prior to filing the aforementioned petition for writ of coram nobis, Jordan

filed a federal petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. In this federal petition Jordan raised the confession question. The federal court stayed all proceedings pending the exhaustion of all claims in the state court. After the denial of the petition for writ of error coram nobis by the state court the federal district court reactivated the federal habeas petition. On March 19, 1981 the United States District Judge, denied the habeas petition, and an appeal was taken to the Court of Appeals for the Fifth Circuit. On August 6, 1982 the Fifth Circuit affirmed in part and reversed in part the decision of the district court, vacating the sentence of death. In affirming the denial of habeas as to the conviction of capital murder the Fifth Circuit decided the confession issue

finding no error in the determination made by the Mississippi Supreme Court or the federal District Court in deciding the issue. A petition for rehearing was filed and later denied. Jordan v. Watkins, 681 F.2d 2067, reh. den. sub. nom., Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982). Neither the state nor the petitioner, Jordan, filed a petition for writ of certiorari with this Court. Jordan's conviction for capital murder became final at that point in 1982 and all the issues pertaining to the conviction also became final. Jordan accepted the ruling of the Fifth Circuit when he did not appeal that court's ruling on the confession issue.

Because of the vacation of the death sentence by the Fifth Circuit, a new sentencing hearing was held in the Circuit Court for the First Judicial District of

Harrison County and a death sentence was returned in proper form by the jury on April 29, 1983. During this resentencing hearing the confession issue was raised again. The trial court held that the issue was res judicata and the Fifth Circuit's ruling on the issue was final. This sentence of death marked the third time Jordan had been sentenced on this charge. On automatic appeal tho the Mississippi Supreme Court petitioner again raised the question of the confession. The court below agreeded with the trial court that the issue was res judicata and finding no other error affirmed the sentence of death again on January 30, 1985, rehearing was denied on March 13, 1985. Jordan v. State, 464 So.2d 475 (Miss. 1985).

Petitioner then sought certiorari from the affirmance of this death sentence filing

his petition on May 13, 1985. Petitioner raised three grounds for relief before this Court in that petition. None of the three questions presented to the Court involved the confession issue. Petitioner's statement in his petition that space limitation prevented him from raising the confession argument at that time is specious and cannot excuse the failure to raise the issue even if it had been a live and viable claim at the time. Petitioner again accepted the resolution by the court below that the issue had become final.

On May 5, 1986 this Court granted the petition for writ of certiorari, vacated the sentence of death and remanded the case to the court below for reconsideration in light of Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Jordan v. Mississippi, 476 U.S. 1101, 106 S.Ct.

1942, 90 L.Ed.2d 352 (1986). On remand the Court below ordered briefs be filed on the Skipper issue. Briefs were filed and the issue was joined.

On April 13, 1987 petitioner filed an Application For Leave To File Motion To Vacate And Set Aside Conviction with the court below again raising the confession issue. The state responded. On September 23, 1987 a unanimous court decided both the Skipper issue and the post-conviction motion, petition for rehearing was denied on February 10, 1988. Jordan v. State, 518 So.2d 1186 (Miss. 1987). In reconsidering the case in light of Skipper the court below held that the case must be remanded another sentencing hearing. In a separate accompanying opinion deciding the post-conviction motion, the court once again held that it would not reconsider the

confession issue as it was res judicata. In this opinion, the court below recited the procedural history of the case and concluded:

We are of the opinion that Jordan's conviction became final in 1982 when the Fifth Circuit upheld his conviction of capital murder and he did not petition the United States Supreme Court to review that decision. We hold that the question is res judicata and is barred from relitigation.

518 So.2d at 1189.

Since 1982 the court below has consistently held that the issue is settled. Petitioner cannot overcome the procedural bars applied to this issue simply by raising the issue again at each stage of the litigation and having the court below state that the issue is closed and will not be relitigated. There must be some finality and we would submit that the issue is closed to further litigation and has been since 1982. Both

the doctrines of res judicata and waiver apply here. The issue was litigated and decided against petitioner in both state and federal courts. Further petitioner has waived any right to raise the issue again when he accepted the disposition of the issue by the Fifth Circuit in 1982 without further appeal.

Petitioner attempted both in the court below and attempts again here to excuse his procedural waiver and overcome the bar of res judicata by arguing that the decision in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), constitutes new law and excuses his failure to raise the claim earlier and also overcomes the bar of res judicata. The court below held in Johnson v. State, 508 So.2d 1126 (Miss. 1987), that a claim raised in a post-conviction context under Jackson

was barred. Later in the same case the issue was presented to the Fifth Circuit in Johnson v. Cabana, 818 F.2d 333 (5th Cir. 1987), cert. den. ____ U.S. ____, 95 L.Ed.2d 861 (1987). In addressing this contention the Fifth Circuit held:

[Petitioner's counsel] further contend that Michigan v. Jackson, ____ U.S. ____, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), constitutes new law in this area which excuses the failure to raise this contention previously. The state responds that Jackson is not new law, that it holds only that counsel should be made available after indictment and arraignment, that Johnson had either been indicted nor arraigned at the time he confessed, that Johnson was not arrested until after he confessed, and that his confession was free and voluntary and was properly taken. We agree that Jackson did not create a new rule of law. Johnson's failure to raise the issue is an abuse of the writ.

[Emphasis added.] 818 F.2d at 344.

As stated above petitioner presented this question on his first direct appeal and

had the question addressed and resolved against him in the 1978 opinion of the court below. Jordan v. State, 365 So.2d 1198, 1201-1203 (Miss. 1978). In its opinion the court addressed the question both in a Fifth and Sixth Amendment context relying on Michigan v. Mosley, 423 U.S. 96, 109, 96 S.Ct. 321, 329, 46 L.Ed.2d 313 (1975) and Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). In his petition for certiorari from direct appeal the issue was raised before this Court. This Court did favor his claim with a grant of certiorari on this issue. Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

When petitioner filed his first state post-conviction challenging his conviction and sentence he did not raise this issue before the court below. This was the first

time he waived the issue and this default alone would bar petitioner from relitigating the issue further in state court as he abandoned the issue when it could have and should been presented to the court below.

In his federal habeas petition Jordan again raised the issue before the district court and was rebuffed. In its opinion affirming the denial of relief the Fifth Circuit Court of Appeals, in Jordan v. Watkins, 681 F.2d 1067, 1070-1075 (5th Cir. 1982), again addressed both the Fifth and Sixth Amendment claims and found them to be without merit. The Fifth Circuit relied on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and Brewer v. Williams, supra, in deciding the claims against the admission of the confession were

meritless. Speaking to the Sixth Amendment claim the circuit court held:

Appellant also argues that his right to counsel under the sixth and fourteenth amendments was violated by his interrogation in the absence of counsel after adversary proceedings had commenced. It is undisputed that adversary proceedings had commenced when the authorities elicited the recorded confession. "[O]nce adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." *Brewer v. Williams*, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424, 438 (1977). This does not mean that at that stage an accused cannot waive his rights under the sixth and fourteenth amendments. *Id.*, 430 U.S. at 405-406, 97 S.Ct. at 1243, 51 L.Ed.2d at 441. Rather, it is "incumbent upon the [prosecution] to prove an intentional relinquishment of a known right or privilege.'" *id.*, 430 U.S. at 404, 97 S.Ct. at 1242, 51 L.Ed.2d at 439. Based on the facts and circumstances previously discussed, we hold that the prosecution met this strict standard with respect to Jordan.

681 F.2d at 1075.

The issue was not addressed further in the opinion on denial of the petition for rehearing by the Fifth Circuit. It is most important at this point to state the petitioner did not challenge, in this Court, the decision of the Fifth Circuit on the confession issue. He accepted the decision of the Fifth Circuit court by failing to appeal the issue further thereby waiving the claim for all time. The conviction for capital murder become final in 1982 under the doctrines of res judicata, law of the case and further litigation is also barred by the doctrine of waiver.

Petitioner cannot say that he did not have the legal tools necessary to raise this issue at that time. Just from the cases cited by the court below on direct appeal and the Fifth Circuit it is clear that the same and similar issues were being litigated

at the time of petitioner's direct appeal and post-conviction proceedings in state and federal court by other counsel. The fact that he had the legal tools available to him at the time to raise the claim demonstrates that there is no reason for the procedural default of abandoning the claim. The language found in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), is worth repetition here:

We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

71 L.Ed.2d at 804.

Murray v. Carrier, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed. 2d 397 (1986); Smith v. Murray, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 434 (1986).

Petitioner again raised the issue on direct appeal from his resentencing. Consistent with the present ruling the court below quoted from the Fifth Circuit's opinion and held:

We are of the opinion that the State met its burden with respect to Jordan and that the question is now res judicata.

464 So. at 480.

Petitioner again waived the issue by not raising it in his petition for certiorari from this resentencing direct appeal. The issue is barred from relitigation.

As we have pointed out, both the court below and the Fifth Circuit have held that Michigan v. Jackson, is not new law. The

real question before this court was answered by the court below and the Fifth Circuit years ago. The question presented here is actually whether or not Jordan validly waived his right to counsel at the post-arraignment custodial interrogation. Jackson does not stand for the proposition that once counsel has been appointed it can never be waived. In fact Jackson pointed out that Maine v. Moulton, 474 U.S. ___, 106 S.Ct. 477, 88 L.Ed.2d 115 (1985); United States v. Henry, 447 U.S. 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) and Massiah v. United States, 377 U.S. 201, 84 S.Ct. 199, 12 L.Ed.2d 246 (1964), were all cases dealing with the question of whether "respondents validly waived their right to counsel at the postarraignment custodial interrogations."

89 L.Ed.2d at 638. See also: 98 L.Ed.2d at 642, fn.9. The issue was addressed and resolved by the court below and the Fifth Circuit. It cannot be relitigated.

Further, even if we were to consider Jackson as new law, it would not be applied retroactively to this case under the recent precedent dealing with new law. Petitioner relied on the decision in Griffith v. Kentucky, 479 U.S. _____, 107 S.Ct. _____, 93 L.Ed.2d 649 (1987), to state that the claim he makes under Jackson, should be considered. However Griffith, clearly states that it applies to litigation pending on direct state or federal review or not yet final when the decision of the United States Supreme Court is handed down. The Court stated:

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied

retroactively to all cases, state or federal pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

93 L.Ed. 2d at 661.

Continuing, this Court defined the word "final" as follows:

6. By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. [Citations omitted.]

93 L.Ed.2d at 657, fn. 6.

The issue at bar has been litigated and direct review of the issue became final in 1979, when this Court finally denied certiorari. Jordan v. State, 365 So.2d 1198, 1201-1203 (Miss. 1978), cert. den., 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). If that alone were not sufficient, the ruling of the United States Court of

Appeals for the Fifth Circuit in Jordan v. Watkins, 681 F.2d 1067, 1070-1075 (5th Cir. 1982), clearly forecloses any further litigation of the issue. Federal review of the issue is now final since Jordan allowed the Fifth Circuit's decision to stand without a petition for certiorari being filed from that ruling. Petitioner was in no way restrained from filing a petition from certiorari from that ruling with this Court and chose not to do so. The time for filing such a petition has long expired. Clearly the issue was fully litigated according to the law in existence at the time and the issue is res judicata. The rationale of Griffith and Allen v. Harcy, 477 U.S. ____, 106 S.Ct. 2872, 92 L.Ed.2d 199 (1986), is to be applied to all criminal cases. Clearly the decisions rendered by the court below and Fifth Circuit regarding

the admissibility of the confession was final at the time of this Court's decision in Jackson. We submit that the issue has been final for eight (8) years, since the denial of certiorari on direct review where this question was raised. Yates v. Akins, 546 (1988), does not change this position. Further Yates can be distinguished in that the Mississippi Supreme Court has placed limits on the issues it will entertain in collateral proceedings and has not addressed the merits of the federal claim in any proceeding since 1979. The issue of waiver of the right to counsel was decided at that time and the issue is closed.

Petitioner's claim that the procedural bar is not regularly applied by the court below is easily distinguishable from the case at bar. Neither cited case was in the same procedural position as the case at

bar. In Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983), the Mississippi Supreme Court considered the intervening decision of Enmund v. Florida, 458 U.S. 782 (1982), in a post-conviction context, the court expressed some confusion whether the issue had been raised or could have been answered in the opinion on direct review. However that post-conviction petition was Edwards' first post-conviction pleading and the issue had not been resolved by a federal court of appeals as in this case. The decision in Enmund was a clear departure from the precedent as it had existed at the time.

Reliance on Culberson v. State, 412 So.2d 1184 (Miss. 1982), is likewise misplaced. The question considered by the court below in Culberson was one concerning ineffective assistance of counsel. The court below has never applied the procedural

bar rule to the issue of ineffective assistance of counsel until there has been a meaningful opportunity to raise such a claim. As stated in Read v. State, 430 So.2d 832 (Miss. 1983):

This Court has never heretofore applied the procedural bar rule where a convicted defendant has on direct appeal urged ineffective assistance of counsel. This is true even though this Court has been considering the ineffective assistance of counsel issue for years, apparently without anyone suggesting that the point had to be procedurally preserved in the trial court. [citations omitted.] In most of these cases the claim of ineffective assistance of counsel was rejected on its merits. But because the issue in each case was treated on the merits, although occasionally cursorily, these cases necessarily stand for the proposition that no procedural bar rule has heretofore been applied.

In addition to the direct appeal cases cited above, we note that right to counsel claims have also been asserted via proper post-conviction proceedings, even though the point was not

preserved at trial and not raised on direct appeal. See Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975); Berry v. State, 345 So.2d 613 (Miss. 1977).

430 So.2d at 838.

Abiding by its long standing policy of treating ineffective assistance of counsel claims made on direct appeal and in a first post-conviction proceeding differently than other claims when applying the procedural bars the court below considered the claim of ineffective assistance of counsel that could not be determined from the record on direct appeal and granted Culberson an evidentiary hearing on the issue of whether he had been denied the right to testify in his own behalf. After a hearing in the trial court on this matter relief was denied again and that denial was affirmed. Culberson v. State, 456 So.2d 697 (Miss. 1984).

Culberson was granted no relief only an evidentiary hearing. The case at bar is different in that the petition raising the issue is a successive post-conviction petition attempting to relitigate a matter by raising an issue that has been previously decided. On successive petitions the court below has held even the issue of ineffective assistance of counsel to be barred. Johnson v. State, 508 So.2d 1126, 1128-1129 (Miss. 1987); Evans v. State, 485 So.2d 276, 280-281 (Miss. 1986), cert. den. ___ U.S. ___, 90 L.Ed.2d (1986).

CONCLUSION

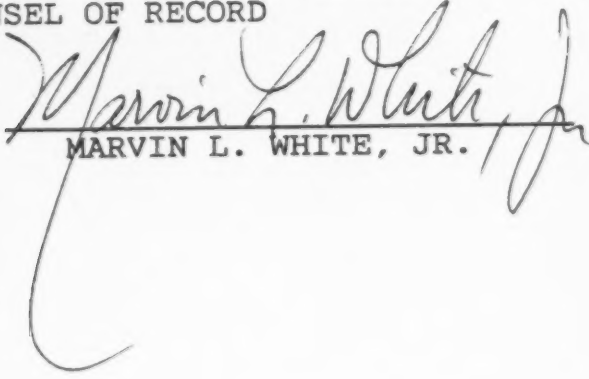
For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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BY:


MARVIN L. WHITE, JR.

CERTIFICATE OF SERVICE

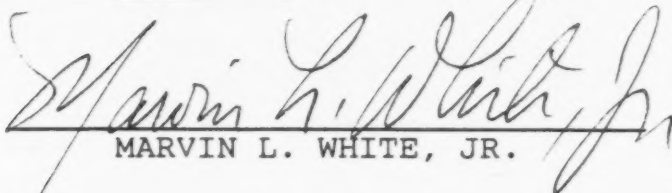
I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief in Opposition to each of the following:

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This, the 24th day of June, 1988.


MARVIN L. WHITE, JR.

